# DEPARTMENT OF CALIFORNIA HIGHWAY PATROL

## FINAL STATEMENT OF REASONS

AMEND ARTICLE 1, DEFINITIONS AND GENERAL PROVISIONS, SECTIONS 1200; ARTICLE 6.5, CARRIER IDENTIFICATION NUMBERS, SECTIONS 1235.1 THROUGH 1235.6; AND ARTICLE 8, SECTION 1256, IDENTIFICATION
ADOPT NEW SECTION 1235.7, LEASED VEHICLES

## MOTOR CARRIER SAFETY
## CARRIER IDENTIFICATION
## (CHP-R-09-15)

**EXISTING REGULATIONS AND AMENDMENTS**

California Vehicle Code (CVC) Section 34501 requires the Department of the California Highway Patrol (CHP) to adopt reasonable rules and regulations which, in the judgment of the Department, are designed to promote the safe operation of vehicles described in CVC Section 34500. Those regulations are contained in Title 13, California Code of Regulations (13 CCR).

California Vehicle Code Section 34507.5 requires certain persons, primarily motor carriers, to obtain a California Carrier Identification number, identified in regulation as a "CA number," from the CHP, and with some exceptions, to display that number on both sides of the vehicles mentioned above. During 2001/2002, in order to provide greater clarity to the enabling statute, the CHP adopted regulations relating to the assignment of carrier identification numbers. Now, however, the CHP believes that recent developments indicate that all persons who are subject to CVC Section 34507.5, should be provided greater clarity with regard to whom the CA number should be assigned. That clarity is provided through formal adoption of regulations in 13 CCR.

**Background**

The CHP promotes the safe operation of the vehicles listed in CVC Section 34500 by various means, one of which is by collecting information relating to the safety performance of the motor carriers who operate those vehicles. Since the development of the Management Information System of Terminal Records (MISTER) in 1986, that information has been stored in an automated record system, which has been used by the CHP primarily as an internal tool to manage its motor carrier inspection workload.

To ensure that information collected is attributed to the correct motor carrier in the records of the CHP, each record is identified with a CA number, and it is this CA number that CVC Section 34507.5 requires certain persons to obtain. While historically, the CA numbers were merely the

means by which those records were identified; today, the CA number is far more relevant in identifying the responsible motor carrier entity.

For years, CA numbers were assigned without specific written rules and without a clear objective of identifying the person responsible for the actual motor carrier operations. Conversely, multiple motor carriers have sometimes shared the same CA number due to a lack of recognition in the CHP's records of their existence as separate legal entities. These errors typically occurred because of confusion with business relationships, such as the relationship between motor carriers and independent drivers contracted to drive vehicles leased by the motor carrier. These drivers (independent contractors) were thought to be independent entities, when in fact they were private contractors operating vehicles leased and operated as part of a larger motor carrier operation. In other cases, two or more separate companies were mistakenly treated as a single company because of their close business relationship, when in fact they were separate legal entities.

This matter was further complicated in 1997, when the Motor Carriers of Property Permit Act (the Act) was signed into law, which created a new class of motor carrier, the "Motor Carrier of Property" (MCP). Among other things, the Act required all MCPs to obtain a CA number from the CHP, and to register it with the Department of Motor Vehicles (DMV), the agency assigned responsibility for issuing the permits created by the Act.

While, most *MCPs*, as defined in CVC Section 34601, are also *motor carriers* as defined in CVC Section 408, and were therefore already subject to CVC Section 34507.5; due to the separate definitions of those terms, there are some MCPs who are *not* also motor carriers pursuant to CVC Section 408. The motor carrier definitions describe two groups that largely overlap one another, but there are many persons who fall into only one of the groups.

This means that there are some persons who are subject to the requirement in CVC Section 34507.5 to obtain and display a CA number solely because they are MCPs as defined in CVC Section 34601, even though they are not motor carriers as defined in CVC Section 408. Those persons must obtain a permit from the DMV to operate their vehicles on the highway, but because they are not also *motor carriers*, they are not subject to the motor carrier safety regulations of the CHP. For these reasons, among others, it is more important than ever to ensure greater clarity is added to the regulations in order to more clearly identify the motor carrier, whether defined by CVC Section 408, CVC Section 34601, or both.

An applicant for a MCP permit obtains the permit to operate certain vehicles on the highway by submitting an application and fee to the DMV and providing proof of adequate insurance as part of the process. The permit represents a privilege that can be suspended or revoked by the DMV. Therefore, the CA number assigned by the CHP now has a dual role. First, it is an identification number that does not entitle the holder to any form of authority or permit to operate. Second, it is used as the unique identifier for an MCP permit in order to reduce the identifying numbers assigned to the motor carrier industry, and that permit *does* entitle its holder to operate certain vehicles on California highways. In this second role, the CA number represents records that could become exhibits in proceedings to suspend or revoke the MCP permits of unsafe carriers or of those that consistently fail to comply with applicable laws. Therefore, as already indicated, it

is now more important than ever that the regulations regarding CA numbers be further clarified, with special emphasis on preventing duplication, sharing, or transferring of CA numbers when motor carriers enter into certain business relationships with other motor carriers or independent contractors. The CA number is no longer simply a database key to a motor carrier's safety record. Now it can represent an MCP's privilege to operate on the highway.

As the CHP works to develop a means by which the motor carrier industry can review certain aspects of their own motor carrier records through use of the internet, it becomes increasingly more important to ensure the records are not only accurate, but that they identify the correct business entity. Also, as this system is currently used by CHP enforcement personnel, as well as other law enforcement and regulatory bodies, it is equally important that the number displayed on each vehicle accurately identifies the motor carrier responsible for the current operation of that vehicle.

## PURPOSE OF THIS PROPOSED REGULATORY ACTION

The CHP has concluded through numerous discussions with motor carrier industry groups over the past several years, that a great degree of confusion continues to exist with regard to identifying the motor carrier responsible for the day-to-day operations of vehicles which are leased by those motor carriers, with or without drivers. While the identifiable majority of this type of arrangement operates in interstate commerce, the CHP has never adopted the federal rules which govern this type of business arrangement.

As early as the 1950s the United States Department of Transportation (US DOT) recognized the need to provide clarity with respect to identifying the motor carrier when leased vehicles are used to increase or decrease a fleet as necessary to accommodate varying workloads. While this was, and still is, relevant with most of the interstate over-the-road operations, it is becoming even more relevant to our global economy with California's numerous ocean going marine terminals. Fluctuations in daily port traffic lead to varying equipment needs, usually addressed through leasing of equipment rather than through vehicle purchases, which offer limited flexibility in overhead costs.

As a result of this need for varying fleet sizes, the Interstate Commerce Commission (ICC) (succeeded by the Federal Motor Carrier Safety Administration [FMCSA]), an administrative entity under the US DOT, realized two problems existed. First, the overlying motor carriers where using vehicles as part of their fleet when in fact those vehicles actually belonged to other motor carriers; and secondly, when the overlying motor carrier did lease a vehicle, the terms of those written leases were, at best obscure, generally resulting in the small independent operators being taken advantage of by the larger, more business savvy, overlying motor carrier. These problems have led to several regulatory actions by the ICC and the FMCSA. These actions are now contained in Title 49, Code of Federal Regulations (CFR), Part 376.

In order to provide a consistent identification of interstate motor carriers under both state and federal rules, it was necessary that the CHP adopt rules which are consistent with existing federal rules. This does not necessarily create new rules for interstate motor carriers, because they are

already subject to those rules, but it does permit the CHP to both identify interstate motor carriers in the same manner as the FMCSA and to enforce substantially the same requirements on those motor carriers as our federal counterpart. This will permit the CHP to move one step closer in providing a seamless enforcement of regulations for motor carriers operating in an interstate mode within the boundaries of California.

The CHP also adopts consistent leasing rules for intrastate MCPs. Those rules which apply to intrastate motor carriers will need to be modeled on the interstate motor carrier rules, but include the necessary changes to accommodate those subtle differences between the FMCSA's motor carrier registration and operating authorities and the DMV's MCP permit.

The adopted rules will conspicuously omit the for-hire passenger transportation industry as well as Household Goods (HHG) carriers as they operate under a separate identification number issued by the California Public Utilities Commission and specific rules adopted by the same agency.

## SECTION BY SECTION OVERVIEW

The CHP amends regulations in 13 CCR, Chapter 6.5 "Motor Carrier Safety" – Article 1, Definitions and General Provisions, Section 1200; Article 6.5, Carrier Identification Numbers; Section 1235.1, Application for Carrier Identification Number; Section 1235.2, Motor Carrier Safety Records of the Department; Section 1235.4, Identification Numbers Nontransferable; and Section 1256, Identification; and adopts new Section 1235.7, Leased Vehicles.

### Chapter 6.5 Motor Carrier Safety.

### Article 1, Definitions and General Provisions.

**Title 13, California Code of Regulations 1200, Scope.**

**Subsection (b)** is amended to reflect recent changes to legislation. Through Assembly Bill 3011 (2006) farm labor vehicles (FLV) were added to CVC Section 34500. Because of this legislative amendment, it is no longer necessary to separately identify FLVs from other vehicles listed in CVC Section 34500.

### Article 6.5, Carrier Identification Numbers.

**Title 13, California Code of Regulations 1235.1, Application For Carrier Identification Number.**

**Subsection (d)** is amended in order to permit the issuance of additional numbers which may be used for the purpose of tracking motor carriers through other databases. One such use of this proposal would be the issuance and recording of numbers issued by the US DOT for the purpose of accessing the federal Motor Carrier Management Information System (MCMIS) database and tracking the safety records of a motor carrier relative to other motor carriers. This is currently not

possible through Management Information System of Terminal Evaluation Records. Not only would this permit comparison of safety records; but it would also permit those motor carriers with exceptional safety records to be readily identified.

**Subsection (e)** is amended to update the revision date of the CHP 362, Motor Carrier Profile, to reflect the current January 2007 revision date.

**Title 13, California Code of Regulations 1235.2, Motor Carrier Safety Records of the Department.**

**Subsection (a)** is amended to repeal the statement indicating all of the information in the record system is public information. While this is true in most instances, certain data (i.e., drivers' license numbers in conjunction with the driver's name and employer identification numbers) is deemed to be confidential in nature. For this reason, the statement is not wholly accurate. This does not preclude the public from obtaining records stored in the system; the majority of the information is available, but certain confidential information will be redacted as required by law.

**Subsection (b)** is amended to update a reference to additional tracking numbers as part of the information which may be part of a carrier record. This will authorize the Department to use such identifiers as US DOT numbers to better assist the Department in identifying motor carriers and tracking the safety record of those motor carriers.

**Title 13, California Code of Regulaltions 1235.4, Identification Numbers, Nontransferable.**

**Subsection (b)** is amended to add language which will clarify the intent of the subsection to permit the Department to delete a CA number which has been inadvertently issued to a motor carrier as a result of the motor carrier's attempt to circumvent or thwart an action against that motor carrier. It has been a longstanding practice of the regulated community to simply apply for a new CA number and continue operations as a new motor carrier in order to avoid a suspension action against the original motor carrier entity.

While the subsection was initially proposed in an effort to prevent this type of circumvention, some question has existed as to whether the Department is authorized to delete a CA number once it has been issued. This amendment will clarify that matter.

**Title 13, California Code of Regulations 1235.7, Leased Vehicles.**

**Subsection (a)** adopted to establish the applicability of the leasing requirements proposed by this section.

**Subsection (b)** is adopted to define certain terms unique to vehicle leases.

**Subsection (c)** is adopted to specify general leasing requirements for the purpose of establishing criteria to permit a motor carrier to use equipment it does not own. California Vehicle Code Section 408, and Section 1201 of this code, define a motor carrier as, among other conditions;

a person who leases vehicles listed in CVC Section 34500. The purpose of this amendment is to lend clarity to the conditions which constitute a lease under the motor carrier definition.

Subsection (c) is also intended to specify specific terms for a written lease, the transfer of equipment, vehicle identification, and record retention requirements. These requirements are necessary in order to ensure adequate enforceability of the regulations.

**Subsection (d)** is adopted to list specific requirements which constitute a written lease agreement required by subsection (c). These written requirements are not intended to place the CHP in a position of dictating conditions which already exist for the purpose of creating binding leasing requirements, but are intended to clearly identify a motor carrier and ensure motor carrier regulations are applied to the correct person.

For a number of years motor carriers operating under the interstate motor carrier safety regulations have been subject to leasing regulations consistent with the regulations proposed by these amendments. However, those rules have been unenforceable by the CHP as those rules were not previously adopted by the state. This adoption will permit the enforcement of specific provisions for intrastate motor carriers using equipment they do not own. These provisions are consistent with provisions listed in the federal requirements, but not identical for reasons listed elsewhere in this statement.

**Subsection (e)** adopts certain exceptions to the requirements of this proposal. Except for the vehicle marking requirements, certain operations are exempted from the remainder of the vehicle leasing requirements during the course of the exempted activity.

**Subsection (f)** adopts conditions under which an authorized carrier may lease equipment to or from another authorized carrier. Provided the prescribed written agreement is maintained as required, a written lease agreement is not required.

**Subsection (g)** adopts the October 1, 2009, edition of Title 49, CFR, Part 376, for interstate motor carriers and drivers. In order to draw a clear distinction between the rules for interstate and intrastate drivers, the CHP has addressed the rules separately. Therefore, subsections (a) through (f) will only refer to intrastate drivers and motor carriers, and subsection (g) will only refer to interstate drivers and motor carriers. This will provide interstate drivers and motor carriers with seamless uniformity between state and federal leasing regulations, thereby, permitting interstate motor carriers to operate under one set of rules.

**Subsection (h)** is adopted to provide an address and telephone number to assist the affected industry in obtaining copies of the federal regulations referenced in subsection (g).

**Title 13, California Code of Regulations 1256, Identification.**

**Subsection (a)** adopts language requiring clear identification of the motor carrier operating each commercial motor vehicle. Specifically, when more than one name is displayed on a motor vehicle, the name of the motor carrier operating that vehicle would be preceded by the words

"operated by." This is also required under federal marking rules. This adoption will lend clarity to the marking requirements and permit interstate and intrastate motor carriers to operate under a single set of vehicle marking requirements.

**Subsection (b)** is amended add the vehicle marking requirements specific to the CA number issued pursuant to Section 1235.3. This requirement also contains exceptions for vehicles displaying a valid number issued by the US DOT or the California Public Utilities Commission.

**Subsection (f)** is amended to permit the display of additional information to a vehicle, provided that display is not specifically prohibited or in conflict with the requirements of Section 1256.

**Subsection (g)** is amended to provide specific requirements for the display and maintenance of the information required by Section 1256.

**Subsection (h)** is amended to permit the use of removable devices in lieu of permanently marking a vehicle with the required identification information.

## WRITTEN COMMENT PERIOD

The CHP received two written responses to the June 5, 2009, Notice of Proposed Regulatory Action. Summaries of the two written comments, discussions and responses follow.

**1st Written Comment**:
Mr. Eric Sauer, Vice President
Policy Development
California Trucking Association

"Prior to the Motor Carrier Act of 1980, the entrance requirements for a small carrier to obtain operating authority through the Interstate Commerce Commission (ICC) were a substantial hurdle to market entry. Additionally, even if a carrier had operating authority, loads which needed to travel over routes the carrier did not have the legal authority to utilize required an agreement with a carrier which had proper authority. The difficulty posed in initially entering the motor carrier industry and moving freight along authorized routes spurred the creation of a lease arrangement by which an equipment owner could utilize a larger carrier's operating authority and carriers could move freight on each other's designated routes.

However, since the deregulation of rates, routes and services, what is required of carriers to obtain both state and federal authorities to operate has been substantially lowered, and the ICC, succeeded by the Federal Motor Carrier Safety Administration (FMCSA), has largely limited their scope of safety regulations. The regulation by the FMCSA of lease language is one of the few areas of economic regulation of the motor carrier industry left."

**CHP Response**: The California Trucking Association (CTA) asserts that the leasing and interchange regulations were developed for the purpose of permitting an equipment owner to utilize the operating authority of a larger motor carrier in order to move freight over each other's

designated routes. On the other-hand, the CHP would argue just the opposite; the leasing and interchange regulations were in large part adopted to permit the larger carrier to operate vehicles it does not own, under a single operating authority; that of the larger motor carrier. The provisions of the regulations were intended to clearly spell out the transfer of a motor vehicle from an owner-operator to an authorized motor carrier.

The CHP would also argue the assertion that "regulation by the FMCSA of lease language is one of the few areas of economic regulation of the motor carrier industry left." The ICC clearly indicated in a January 9, 1979, decision (Ex-parte No. MC-43 [Sub-No. 7]) that the lease and interchange regulations were adopted in order to promote full disclosure between carriers and owner-operators, often referred to as "truth-in-leasing."

**Comment:** "With regards to the NPRA section titled '*Effect on Small Business*', it should be noted that this proposal represents a brand new mandate for Intrastate Motor Carriers who utilize owner-operators. Through our discussions with interstate carrier members of CTA already complying with *49 CFR 376*, we've determined the additional administrative burden will require an increase in the staff and cost necessary to operate an intrastate fleet.

Also, through consultations with several attorneys specializing in transportation, it has been noted that litigation can be brought about by a single breach of contract. Such a lawsuit could create cause for class action for all contractors subject to the same leases brought under scrutiny. Further complicating matters is that, per case law, these contracts are not 'one size fits all'. Smaller carriers would be less able to bear the costs associated with tailoring and updating complex legal contracts."

**CHP Response:** At this point, it is important to clarify the CHP does not intend to adopt regulations requiring or mandating any particular business relationship for "Intrastate Motor Carriers who utilize owner-operators." To the contrary, the proposed regulations are intended to permissively regulate business relationships where a motor carrier leases a vehicle in order to use that vehicle as part of its own fleet. In no way do these regulations require a motor carrier to lease a vehicle or mandate the creation of any type of business relationship which does not already exist.

For a number of years, the CHP has met with industry representatives in order to explain the individual ownership of carrier identification. The motor carrier industry has long held a number of individual understandings of how the ownership of this identification may be applied. This lack of a single understanding has prompted the necessity for the CHP to adopt regulation in order to make clear the intent of carrier identification.

Throughout this process, the CHP has stood by its intent to further clarify the need for a more consistent means of identifying motor carriers operating in interstate or intrastate commerce. While FMCSA has had leasing regulations in place for well over half a century, the CHP is finding it more necessary than ever before to adopt those rules in order to provide an equal application of those rules, with regard to federal and state enforcement programs.

As for the state's intrastate motor carriers, no rules currently exist permitting a motor carrier to use vehicles it does not own and to display the identification number of the motor carrier using those vehicles. While motor carriers have often rented or leased vehicles from large companies whose business is to lease vehicles (companies principally engaged in this business are excepted from much of these proposed regulations), no regulations are in place to allow for a consistent approach to this type of business practice for individuals wishing to lease their vehicle, with or without a driver.

As for the legal arguments referring to potential litigation, the CHP is only proposing the leasing contracts contain generic elements, consistent with the federal rules; the specifics of each element are up to each motor carrier to specifically define as their business needs dictate. Also, the CHP requires a number of documents be created by a motor carrier involved in the transportation industry, anyone of which might bring about litigation if incorrectly executed. It is not within the purview of the CHP to be any more specific than what is proposed by these regulations or to develop regulations which are so prescriptive in nature as to tell the motor carrier exactly how to avoid litigation. The motor carrier is held responsible to make its own business decisions as to whom to do business with and then how that business relationship will be orchestrated. The only interest of the CHP is to be able to identify the motor carrier, through consistent documentation of the relationship, once those decisions are made.

**Comment:** "The proposed language found in 1235.7 (g) merely states that carriers engaged in interstate commerce shall comply with the federal leasing regulations. It is silent as to enforcement as well as to 'mixed' or 'dual' operations."

"Also, certain agricultural commodities are exempt from federal lease requirements per 49, USC Sec. 13506."

**CHP Response:** From the onset, the CHP recognized the need for intrastate regulations which would not conflict with those regulations applicable to interstate motor carriers. This was the primary reason for proposing regulations which so closely mirror the federal regulations. As the proposed regulations now exist, a motor carrier who is currently operating lawfully under the federal rules will not need to make any changes to their current agreements in order to also comply with the state rules. However, to ensure clarity, the CHP has added subsection (i) to 13 CCR, Section 1235.7 to the adopted regulations expressly permitting use of the federal rules for interstate operations.

As for intrastate motor carriers who choose to utilize these rules once they are in place; nothing would preclude that motor carrier from adding the additional federal elements, at the time the agreements are created, in order to allow a seamless transition into interstate commerce, at some future date.

With regard to the federal exemption of agricultural commodities; this exemption is relative to federal jurisdiction and not specific to Part 376. The U. S. Code, Title 49, Section 13506(a), specifically states, in part: "Neither the Secretary nor the Board has jurisdiction under this part over -

(1) a motor vehicle transporting only school children and teachers to or from school;
(2) a motor vehicle providing taxicab service;
(3) a motor vehicle owned or operated by or for a hotel and only transporting hotel patrons between the hotel and the local station of a carrier;
(4) a motor vehicle controlled and operated by a farmer and transporting -
    (A) the farmer's agricultural or horticultural commodities and products; or
    (B) supplies to the farm of the farmer;
(6) transportation by motor vehicle of -
    (A) ordinary livestock;
    (B) agricultural or horticultural commodities (other than manufactured products thereof);

To say U. S. Code, Title 49, Section 13506, was intended to exempt the above listed motor carriers from state oversight is flawed in rational. This is akin to implying the federal legislature never intended the states to regulate pupil transportation (school busses) either, as both references are equal subsections of the same section. While the Secretary of the Department of Transportation may be unable to promulgate regulations for the exempted classes of motor carriers, the states have the authority to exercise full regulatory oversight as evidence by the omission of any restrictive reference to the states. For this reason, the CHP intends on including the agricultural industry in this regulatory action.

**Comment:** "The CTA strongly recommends the allowance of an implementation period of no less than 24 months during which violations will be for educational purposes only. Such a period would allow for intrastate carriers to learn about the requirements, hire and train additional staff, and implement compliance protocols.

The probationary enforcement period would be paired with an outreach campaign by the CHP in order to educate intrastate carriers about the new requirements and familiarize Interstate carriers with CHP's intended auditing criteria."

**CHP Response:** While the CHP finds merit in the concept of providing intrastate motor carriers assistance with the proposed regulations; the proposed 24-month implementation period is excessive and unnecessary. As already stated, the proposed regulations are not mandating a motor carrier to change its business practices or to form new business relationships. The intent is to permit the CHP to both identify interstate motor carriers in the same manner as the FMCSA and to enforce substantially the same requirements on those motor carriers as our federal counterpart.

However, for those business entities which have engaged in some sort of vehicle leasing relationship enacted prior to the proposal of these regulations, the CHP would require the terms of these regulations be met no later than June 30, 2011. This should allow adequate time for the very few intrastate motor carrier's currently involved in leasing vehicles for intrastate commerce, to update their contracts (if not already using the federal rules as a business model) and comply with the proposed regulations, once adopted.

**Comment:** "Section 1235.7(3) (E) of the proposed regulation requires retention of the written

leases for six months following the termination of a lease. However, the corresponding federal regulations at 49 CFR 376 have no specified record retention guideline. Would the adoption of the 1235.7 require an interstate carrier, subject to 49 CFR 376, to maintain copies of the lease for six months after termination or would this only apply to intrastate carriers."

**CHP Response:** Title 13, CCR, Section 1235.7(c)(3)(E), is only applicable to intrastate motor carriers, as stated in subsection (a) of that same section. The purpose of the six-month retention period is to permit enforcement personnel the opportunity to identify which vehicles were under the control of the motor carrier for the time immediately preceding an inspection. Because both the statutory and regulatory definition of "motor carrier" acknowledge those instances where a motor carrier leases a motor vehicle; thereby, making that vehicle part of the motor carrier's fleet and consequently the motor carrier's responsibility for the purpose of the safety regulations contained in 13 CCR, Chapter 6.5, it is imperative that inspection personnel know the duration the agreement was in effect.

As for the retention requirements imposed by FMCSA, the CHP would like to note that Title 49, CFR, Section 379.3 (ref. Appendix A section 5.[f]) requires motor carriers to retain lease agreements for a specified retention period of 1 year after the expiration or termination of the lease. However, the CHP chose not to place any greater burden on industry than necessary. The six-month retention period is intended to mirror the same retention period required for Supporting Documents contained in 13 CCR, Section 1234(a). In fact, it could be argued, based on the owner/driver's relationship to the vehicle (vehicles are routinely leased *with a driver*), the requirement in 13 CCR, Section 1235.7(c)(3)(E) is somewhat duplicative of the retention requirements in 13 CCR, Section 1234(a), but for the sake of clarity, the CHP elected to list the lease retention requirement separately.

**Comment:** "For independent contractors whose leases have expired less than six months ago, we know that the Department's current position is that the driver and maintenance records are the responsibility of the overlying carrier for the period while the lease was in force, but we are unclear regarding its viewpoint on the responsibility for fees. It is our understanding that the Department's viewpoint is that the physical inspection of vehicles is not the responsibility of an authorized carrier lessee once control of the vehicle is returned to the registered owner lessor."

**CHP Response:** While the CHP is unclear as to the reference to "fees;" CTA's reference to the responsibility of the motor carrier is accurate. During the period the lease is in effect, the lessee is the motor carrier, pursuant to CVC Section 408, and 13 CCR, Section 1201(q). At the time the lease expires or for some reason is made null, the responsibilities associated with being the motor carrier are applicable again to the lessor. This is not to say the lessee does not remain responsible for those requirements which were in affect "on his watch," but the scope and duration of responsibility commence on the day the lease went into effect and terminate on the last effective day of the lease.

**Comment:** "These last points bring to the fore the larger issue, that it is difficult to fully expect regulated entities to comment on a proposed rulemaking when the extent of punitive actions resulting from the rulemaking has not been disclosed. Will a missing or incomplete lease

agreement result in a driver being placed out of service? Will there be a fine imposed? Will there be ramifications for BIT inspections if leases are not maintained correctly? Also, how will the CHP enforce those provisions related solely to economic aspects of the relationship between an Independent Contractor and the overlying carrier? Will it now be investigating and acting upon every complaint that a carrier paid the Independent Contractor in 16 days rather than 15 or calculated the interest incorrectly upon a $500 escrow account? Such issues simply illustrate how far beyond safety concerns the proposed regulations go."

**CHP Response:** As for the question of enforcement, the CHP is limited in enforcement by the statutory oversight and punitive authority provided by the legislature. Regarding the matter of motor carrier being placed out of service for a "missing or incomplete lease agreement," the Department is limited to exercising its out-of-service authority within the scope of the North American Standard Out-of-Service Criteria, as published by the Commercial Vehicle Safety Alliance and adopted by reference into 13 CCR, Section 1239.

With regard to fines and the Biennial Inspection of Terminals (BIT) Program, an incomplete lease agreement will be treated as any other documentation discrepancy, resulting in documentation during a BIT inspection (administrative, not punitive) and missing leases will be treated as though no lease exists. Without a lease in place, identifying someone other than the registered owner as the motor carrier responsible for the vehicle; the registered owner is considered the motor carrier for the purpose of the BIT Program, unless the registered owner can provide articulable proof to the contrary.

As has been stated from the beginning of this rulemaking process, the purpose and intent of this regulatory action is to provide a consistent identification of motor carriers for both interstate and intrastate operations. It was never the intent of the CHP to provide any regulatory oversight regarding the economic practices of the motor carrier industry. As a matter of fact, the proposed regulations were intentionally drafted to allow the various types of carriers using vehicles provided by a lessee the greatest latitude in establishing leases.

The regulations simply describe the elements to be contained within a lease agreement and in no way are they intended to dictate to a motor carrier what conditions to prescribe for each element. As an example, regarding the element described as "Compensation to be Specified;" the CHP is not concerned with the actual compensation value, but only that the agreement contains a compensation clause.

However, after careful review of the proposed regulations, the CHP finds merit in CTA's concern with the enforcement of certain aspects of the proposed regulations. The CHP has determined that certain elements of proposed 13 CCR, Section 1235.7 can be deleted without a substantive impact on public safety, allowing a more concentrated enforcement effort on those elements directly effecting safety matters. The CHP proposes to delete subsection (b)(5), *Escrow Fund* (defined); all or part of subsections (d)(5), *Items Specified in Lease*; (d)(6), *Payment Period*, (d)(8), *Charge Back Items*; (d)(9), *Products, Equipment, or Services from Authorized Carriers*; (d)(10)(C), *Insurance*; and (d)(11), *Escrow Funds.* While the CHP continues to support the concept that requiring an agreement to contain these elements, without regulating the

content of these elements, does not constitute economic regulation; the argument can be made that these elements may be deleted, lessening the requirements on those motor carriers choosing to use this provision, without a substantive impact on public safety.

**Comment:** "The proposed rulemaking is, at present, rife with regulatory language not germane to Carrier Identification. Specifically, 49 CFR 376 is twentieth century, pre-deregulation law which should not be brought into the regulation of our modern trucking industry. The adoption of federal language, which was originally meant to allow equipment owners who could not obtain ICC authority to operate and authorized carriers the ability to travel on regulated routes they could not legally carry freight on, will only serve to confuse safety regulations.

Thankfully, the California Vehicle Code already provides the Department and Industry the vehicle by which to convene to discuss the promulgation of modern regulatory language which will truly serve clarify safety and auditing responsibilities for motor carriers of property engaging owner-operators. CVC 34501(a)(3) provides for a 15-member committee to serve in an advisory capacity to the Department. We strongly recommend the convening of this Industry Advisory Committee to assist in the formation of new rulemaking which will better serve the Department's stated purpose of Carrier Identification.

In summary, the Proposed Regulatory Action will not accomplish what it is intended to do. CTA is requesting the Department not move forward on adopting the NPRA until a more reasonable proposal can be formulated with industry input. As stated previously in the comments, adopting this rulemaking will lead to confusion, possible litigation and will not bring the Department and industry a true resolution."

**CHP Response:** The CHP respectfully disagrees with this comment by CTA stating the federal language "was originally meant to allow equipment owners who could not obtain ICC authority to operate, and authorized carriers the ability to travel on regulated routes they could not legally carry freight on." The ICC made clear the intent of the Lease and Interchange regulations were "adopted to promote full disclosure between carriers and owner-operators." This clarification is found in the ICC decision *Ex Parte No. MC-43 (Sub-No. 7), decided January 9, 1979.*

Clearly, the intent of the federal regulations were to permit authorized motor carriers to perform transportation activities in vehicles it did not own and to provide transparence with regard to the written instruments used to transfer that equipment. The means of transfer, pursuant to Title 49, CFR, Part 376, is a lease. This is not a term used to describe a contract/subcontract relationship between two motor carriers; a loose arrangement to allow one motor carrier to use the motor carrier identification number of another authorized motor carrier; or even a vague sort of leasing of services of one motor carrier by another motor carrier; but an actual leasing of a vehicle (with or without a driver) by an authorized motor carrier to use as its own.

The CHP has met with affected industry representatives (including many of those currently on the Motor Carrier Advisory Committee) on numerous occasions during the past ten years in an attempt to resolve this matter in the most effective manner while presenting the minimal impact on the motor carrier industry. During this period of time, the CHP has collected dozens of lease

agreements (primarily interstate in nature), each different from the next. Many of these agreements borderline on sub-contract agreements with only a minor reference to leasing the vehicle, generally through a vague reference to Part 376. For this reason, it is imperative the CHP adopt rules which will assist in clearly identifying the responsible motor carrier.

It is uncertain additional meetings would result in any new information from which to base adoption of these regulations. The CHP is not opposed to continuing a healthy dialogue with the effected industry, but little latitude exists when adopting federal rules for enforcement by the state.

**Written Comment:**
Mr. James Johnston, President
Owner-Operator Independent Drivers Association, Inc.

"The Owner-Operator Independent Drivers Association, Inc. is a not-for-profit corporation incorporated in 1973 under the laws of the state of Missouri, with its principle place of business in Grain Valley, Missouri. OOIDA is the largest international trade association representing the interests of independent owner-operators, small business motor carriers and professional drivers. The nearly 159,000 members of OOIDA are professional drivers and small business men and women located in all 50 states and Canada who collectively own and operate more than 240,000 individual heavy-duty trucks and small truck fleets. One-truck motor carriers represent nearly half the total number of active motor carriers operating in the United Stats while approximately 96 percent of active motor carriers operate 20 or fewer trucks."

**Comment: "**Insuring that violations are attributed to the proper motor carrier entity and that processes are in place to prevent them from simply shutting down and reopening under a different CA number is identical to a well recognized problem at the national level in issuance of US DOT operating authority. The Federal Motor Carrier Safety Administration ("FMCSA") recognizes this is a problem and refers to these 'rouge' motor carriers as 'chameleon carriers.' This is because of the extent ownership will go to hide their association with a previous motor carrier as they attempt to circumvent federal regulations that they run afoul of. OOIDA believes that this proposed rulemaking will enhance CHP's ability to place proper accountability on the responsible motor carrier and thereby improve highway safety within California."

**CHP Response:** The CHP agrees with the Owner-Operator Independent Drivers Association's (OOIDA) concern with "chameleon carriers." The activity of simply inactivating or abandoning a motor carrier entity which is facing administrative actions or criminal charges and resurfacing as a new motor carrier, is a method often used by unscrupulous motor carriers to thwart MCP permit suspensions or court imposed fines. For this reason, the CHP has promulgated regulations, as a result of this rulemaking, to clarify the intent of 13 CCR, Section 1235.4(b), authorizing the CHP to not only refuse to issue a CA number, but to permit the deletion of a CHP number issued to a motor carrier with an action pending through the DMV or the PUC.

**Comment:** "This rulemaking also proposes to adopt a new Section (13 CCR §1235.7) governing leased vehicles for California intrastate motor carriers. This new Section effectively mirrors the federal regulations contained in 49 C.F.R. Part 376, Subparts A, B, and C. As noted in the *Initial Statement of Reasons* for this proposal, California based motor carriers engaged in interstate commerce are unaffected by this proposed rule since they must already be in compliance with 49 C.F.R. Part 376 if leasing vehicles.

The adoption of regulations governing the lease of vehicles not owned by the motor carrier who conducts their business only within California is long overdue. Many motor carriers and their respective associations are likely to oppose this rule as unnecessary and an interference in the marketplace with little or no associated safety benefit. It has been clearly shown in studies that there is a direct correlation between compensation and highway safety."

**CHP Response:** The CHP has stated from the beginning of this rulemaking process that because interstate motor carriers are already subject to the leasing rules listed in Title 49, CFR, Part 376, the proposed rules will not add any regulatory burden to the interstate community. However, adoption of the federal regulations will authorize the CHP to enforce rules which are already imposed on hose motor carriers by the FMCSA.

**Comment:** "Highway Safety can only be improved when the proper party is held accountable for violations made under their authority. The assignment of unique identification numbers will allow the Department of motor vehicles and the CHP to identify those carriers who are attempting to circumvent the law by addressing this issue. When a motor carrier evades their responsibility by reinventing itself as another entity to shield itself from sanctions, not only is highway safety compromised, but the entire motor carrier industry that complies with regulations are placed at a competitive disadvantage in the marketplace.

The Federal Motor Carrier Safety Administration has attempted to address this issue of being able to identify and track motor carriers through several initiatives:

- The Commercial Vehicle Information Systems and networks (CVISN)
- The Performance and Registration Information Systems Management (Prism)
- The Comprehensive Safety Analysis (CSA) 2010 initiative

All three have a nexus to improving highway safety and the promise of more accountability. Unfortunately, all these initiatives will fail to fulfill their potential if enforcement is lax and penalties are seen as nothing more than a "cost of doing business". OOIDA has a significant body of knowledge involving the 'flipping' of ownership, 'masking' and 'chameleon' behaviors of motor carriers who are especially egregious violators of the federal regulations that effect safety. Yet, even with federal court decisions of guilt and documented challenges to the issuance of new authority from OOIDA, certain motor carriers and their corrupt management are still allowed to operate with impunity by the granting of new operating authority.

**CHP Response:** The CHP agrees with the need to correctly identify the person responsible for motor carrier operations. The Owner-Operator Independent Drivers Association is accurate with identifying the multiple means the FMCSA has used to attempt to identify motor carriers and then use those processes to further identify unsafe motor carriers. It is also essential to public safety to identify unsafe motor carriers and then hold those persons responsible for unsafe operations without permitting them to simply recreate themselves as a new entity, without any of the past history, but continuing the same unsafe operating practices.

**Comment:** The linkage between minimal standards governing the lease of equipment/drivers and highway safety should be obvious to anyone. For example, during the past couple of years the burden of owner-operators at the ports of Los Angeles, Long Beach, and Oakland has been communicated in most California newspapers as well as nationally. In many instances, the difficulties and short-cuts port truckers take in an effort to maintain their trucks, can be attributed to the predatory practices of the motor carrier community that will not take responsibility for the vehicles they operate but instead are using the owner-operator status as an independent contractor to avoid any penalty. While financial schemes have been put in place to modernize much of California's drayage fleet, the financial ability of owner-operators to effectively and properly maintain their equipment - even new equipment - is compromised by a lack of minimal regulations governing their business relationships."

**CHP Response:** Beginning in 2003, the CHP joined the FMCSA, as a state partner, assisting in conducting federal New Entrant Safety Assurance Process (NESAP) audits. In order to best conduct these audits, it was necessary the CHP better understand the leasing regulations and properly identify the motor carrier being audited.

This new understanding of the leasing regulations led the CHP to understand the gross misapplication of the federal rules across the interstate motor carrier community. The most common misconception was a belief that the leasing regulations did not actually pertain to the lease of a vehicle, but a lease of services; resulting in a hybrid sort of subcontract agreement where the "owner-operator" remained responsible for his own maintenance and hours-of-service requirements, yet held himself out as the overlying motor carrier through placarding and shipping papers in order to fulfill contractual agreements.

The overlying motor carrier benefited greatly from this arrangement while the owner-operator shouldered the cost and regulatory responsibilities. As the CHP's understanding of these arrangements increased, identification of the motor carrier and the associated regulatory responsibilities became more consistent. In the above scenario, minus a clear lease agreement, owner-operators were told to remove the overlying motor carrier's name and identification from their vehicle and to obtain their own operating authority.

This type of enforcement forced the overlying motor carriers more in the direction of a lease agreement, but in most instances, the language remained vague and at times very difficult to discern from a sub-contract. Adoption of these proposed regulations will permit the CHP to enforce specific requirements, making clear who is responsible for the motor carrier operations. The CHP fully agrees with OOIDA's link between "standards governing the lease of

equipment/drivers and highway safety." The answer is obvious, it is necessary to identify the motor carrier responsible for the day-to-day operations in order to correctly apply regulatory oversight.

**PUBLIC HEARINGS**

The CHP held a public hearing on October 15, 2009. The hearing related to Carrier Identification. A total of 3 attendees provided comment. A summary of this hearing follows.

**1st Commenter**
**Joe Rajkovacz**
**Regulatory Affairs Specialist**
**Owner-Operators Independent Drivers Association**

**Comment:** "OOIDA supports CHP's proposal to adopt the new Section 1235.7; adopting into the California Code of Regulation essentially regulations modeled after the federal leasing rules. 'What's good for the goose is good for the gander.' Interstate motor carriers have had to comply with these regulations ever since the termination of the ICC; we've worked to see that these regulations were maintained, because it does establish a basis of contracting between owner-operators and motor carriers. It establishes a floor. For that purpose we certainly would like to see CHP follow through and adopt those regulations."

**CHP Response:** As the CHP has indicated, adoption of the federal rules for interstate motor carriers will not result in any additional requirements because those motor carriers affected by the state regulation are already subject to identical federal regulation. The CHP finds it necessary to adopt the federal regulations, by reference, in order to enforce identical rules as our federal partners, the FMCSA.

**2nd Commenter**
**Fred Recupido, Transportation Advisor**
**California Dump Truck Owners Association**

**Comment:** "While the CDTOA is not necessarily opposed to this regulation, quite frankly, I am trying to figure out what the purpose of the legislation is. According to what I am reading, the California intrastate carrier must still have a CA number and have a motor carrier authority of his own. We in the dump truck business cannot see any type of scenario where a lease would ever be entered into in not only the dump truck business, but any other sort of intrastate carriage because each person must have their own CA number.

The other question we would have, or the confusion we would have, is poor carriers down in the port if they are a California motor carrier are not precluded from leasing on with another motor carrier. My company for example is a California motor carrier for intrastate and I also hold ICC motor carrier authority through the federal government. So, I would say we are a little confused and we would have questions as to exactly what the purpose is as far as application to intrastate transportation.

Again, as a 38 year carrier in California and being a prime carrier who hires owner operators I cannot see in any case would I need to nor would I want to in any circumstance lease another owner operator with a truck. That would be the absolute last thing I would want to do."

**CHP Response:** The CHP understands the "confusion" expressed by the CDTOA. Minus clear state oversight and the lack of consistent enforcement, the industry has developed a number of self-defined methods of determining compliance with the federal leasing regulations. This is further aggravated with predominantly intrastate-based organizations, such as the CDTOA, who have never had any leasing rules in place to clearly regulate the operation of vehicles they do not own.

Promulgation of these regulations will permit the CHP to work with their federal partners, the FMCSA, to consistently apply and enforce the federal rules with interstate motor carriers and to provide a level and equal platform from which to apply the intrastate rules with intrastate motor carriers. As already indicated, in order to minimize the need for duplication; a motor carrier involved in both interstate and intrastate operations, will be permitted to comply with the federal rules across all operations, thereby, being deemed compliant with state requirements as well.

**3rd Commenter**
**Nick Thompson**
**Director of Safety and Policy**
**California Trucking Association**

**Comment:** "The CTA does not agree that CVC 34501, cited as authority by the Department in its initial statement of reasons, gives the Department the proper provision of law to enact this rule. We also believe it to be in conflict with federal statute, specifically, the Federal Aviation Administration Act of 1994, otherwise known as the "F Four A".

CVC 34501 says the Department shall adopt reasonable rules and regulations that are designed to promote the safe operation of commercial vehicles. However, even after reading the Department's Initial Statement of Reasons, the question still remains: How does the regulation of the fiduciary details, of lease contracts, promote safety?

In fact, the Department wrote in its Initial Statement of Reasons that regulating the content of leases was deemed necessary by the ICC to prevent independent contractors from "being taken advantage of by the larger, more business savvy, overlying motor carrier". This is old language from an agency that did have economic authority during regulated commerce.

While attempting to prevent smaller carriers from being taken advantage of by larger carriers may be a legitimate consumer affairs or fair business practice issue, we fail to see how it relates to promoting safety and further how and from where did the department receive its authority to regulate business practices?"

**CHP Response:** The CHP is promulgating regulations relative to motor carrier identification based on the authority contained in CVC, Section 34501. This section authorizes the CHP to

"adopt reasonable rules and regulations that, in the judgment of the department, are designed to promote the safe operation of vehicles described in CVC, Section 34500." As has already been discussed in this document, identification of the motor carrier is necessary for the CHP to carry out its duties relating to motor carrier safety.

As for the Federal Aviation Administration Act of 1994, this Act (P.L. 103-305) amended U. S. Code, Title 49, Section 11501(h). However, this section was later amended by the ICC Termination Act of 1995 (P.L. 104-88, Sec. 102[a]) and as a result of this amendment, the text of Section 11501(h) was moved to U. S. Code, Title 49, Section 14501(c).

The subject of this section was and is motor carriers of property; the section states, in part; "states may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a *price, route,* or *service* of any motor carrier. However, this same section, Paragraph (c)(2), goes on to state, Paragraph (1)(A) [of Section 14501(c)] shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization."

As already indicated, the CHP has no interest or intention of regulating the economic aspects of the motor carrier industry. Simply requiring a document to contain specific subject matter is not the same as enforcing the specifics contained in that provision of the agreement. The regulation of vehicle leasing and motor carrier responsibility has been a long-time practice of the US DOT and is not simply a hold over from the days of economic regulation. The current FMCSA and the CHP both realize the importance of identifying motor carriers and the equipment they operate.

**Comment:** "After the adoption of the 'F Four A,' California passed AB 1451 (Conroy) into statute, severely limiting the Commissions power to economically regulate trucking. This included limiting the regulation of the relationship between prime carriers and subhaulers solely to restricting prime carriers from engaging unlicensed subhaulers.

If the Department were to adopt the current proposal, it would conflict with some of the actions taken by the Commission to conform with the 'F Four A.'

For instance, the PUC used to require prime carriers paying subhaulers on a percentage of the freight bill revenue to be given, upon request, a rated copy of the freight bill or bills.
The Commission deemed this provision pre-empted by the 'F Four A' because it did not oversee safety, route controls based on size and weight or hazardous cargo, or insurance."

**CHP Response:** As is often a point of misunderstanding, the CHP has no interest in regulating the business relationship between a "prime carrier" and their "sub-haulers." This proposal does not address contractors and sub-contractors, but rather attempts to address motor carriers with federal operating authority, or a state MCP permit, who use vehicles they do not own.

This is the very type of misapplication of federal rules which necessitated this rulemaking. Subcontracts between motor carriers are a completely separate matter. These are general business arrangements where one motor carrier contracts the services of another motor carrier in order to fulfill a larger contract. In these instances, both motor carriers are required to have the applicable authority or permit and act as themselves for the purpose of fulfilling the contract.

However, the purpose of these rules are intended to identify the viable motor carrier entity (the motor carrier with a valid authority of permit) who leases vehicles, displays the leasing motor carriers name and identification number on both sides of the vehicle, and either hires or contracts a driver to operate the vehicle on the motor carrier's behalf. This is a very different matter than that which is addressed by the commenter; but nonetheless, a common misunderstanding or misapplication of the rules.

## STUDIES/RELATED FACTS

Since publication of the Notice of Proposed Rulemaking, the FMCSA has published the 2009 edition of Title 49, CFR. While no changes were made between the 2007 edition and the 2009 edition, the CHP has amended the text of the regulations to adopt the most current edition, without regulatory affect.

Additionally, for those business entities which have engaged in some sort of vehicle leasing relationship enacted prior to the proposal of these regulations, the CHP would require the terms of these regulations be met no later than June 30, 2011. This should allow adequate time for the very few intrastate motor carrier's currently involved in leasing vehicles for intrastate commerce, to update their contracts (if not already using the federal rules as a business model) and comply with the adopted regulations.

## LOCAL MANDATE

These regulations do not impose any new mandate on local agencies or school districts.

## IMPACT ON SMALL BUSINESS

The CHP has not identified any significant impact on small business. This does not represent an additional mandate on motor carriers, but simply provides a method by which an intrastate motor carrier can operate vehicles it does not own. This is not to say a motor carrier who chooses to operate under the provisions of this regulatory process will not incur certain administrative costs; the fact is, a motor carrier who elects to use these provisions would voluntarily subject themselves to the administrative costs associated with certain document preparation and retention requirements required by this rulemaking, but it is important to recognize, this is a business option which does not currently exist. However, an intrastate motor carrier who continues to operate its own vehicles, under the current rules, would be completely unaffected by this proposal. Interstate motor carriers are already subject to the requirements proposed by 13 CCR,

Section 1235.7(g). Adoption of the federal rules simply permits the CHP to enforce those rules already included in 49 CFR, Part 376.

## ALTERNATIVES

The CHP has not identified any alternative, including the no action alternative, which would be more effective and less burdensome for the purpose for which this action is proposed. Additionally, the CHP has not identified any alternative which would be as effective, and less burdensome to affected persons other that the action being proposed.

*Alternative Identified and Reviewed*

1. Make no changes to the existing regulations. This alternative would leave intrastate motor carriers without a clear means by which to include leased vehicles, other than those leased through a leasing company, as part of their fleet. While this is not a wide-spread practice among intrastate motor carriers, it is necessary to ensure intrastate motor carriers with the same flexibility as interstate motor carriers. At the same time, the "make no changes" alternative would continue to exacerbate the CHP's current lack of enforcement authority with regard to interstate motor carriers "leasing" vehicles in order to meet various transportation needs.

## ECONOMIC IMPACT

The CHP has determined that this new regulation will result in:

- No significant compliance costs for persons or businesses directly affected. Any impact to the transportation industry would be realized through voluntary use of the proposed leasing regulations.

- No discernible adverse impact on the level and distribution of costs and prices for large and small business.

- No impact on the level of employment in the state.